No. 33904

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

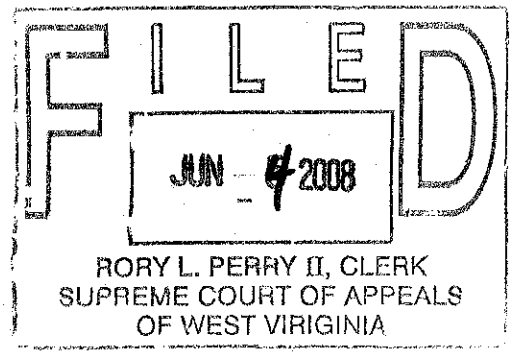
LAURIE ANN MURPHY, *et. al.*,

Plaintiffs - Appellants,

v.

LAURA MILLER, D.O., *et al.*,

Defendants - Appellees.



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I. INTRODUCTION

Appellee West Virginia University Board of Governors submits this brief in response to the brief filed by Appellants Laurie Ann Murphy and Shawn M. Murphy, Sr., individually and as parents and guardians of Shawn M. Murphy, Jr. This Court should affirm the judgment of the Circuit Court of Ohio County because the circuit court properly exercised its discretion by denying Appellants' motion for a new trial after the jury rendered a verdict for Appellees in this medical malpractice action involving a child injured at or around the time of his birth. First, the circuit court did not err by allowing Appellees two peremptory challenges each because their interests were antagonistic or hostile. Second, the circuit court did not err by failing to strike three prospective jurors for cause because they were not biased and/or not challenged. Third, the circuit court did not err by admitting the deposition testimony of Appellants' expert Dr. James Balducci, M.D., an obstetrician, because it was evidence supporting the defense theory of causation. Fourth, the circuit court did not err by admitting limited testimony from the Board of Governors' expert Dr. Robert C. Cicco, M.D., regarding causation because Appellants opened the door to such opinions, which were elicited by Appellee, Dr. Dennis L. Burech, M.D. Fifth, the circuit court did not err by admitting cross-examination of Appelants' expert Dr. Al Condelucci, Ph.D., a life care planner, as to educational or other public benefits and services available because such are not impermissible collateral sources. Finally, the circuit court did not err by granting a partial judgment as a matter of law to the Board of Governors, holding that there was no evidence that Nurse Melissa Asher deviated from the standard of care concerning volume based on the unequivocal testimony of Appellants' expert Dr. Donald M. Null, Jr., M.D. Accordingly, this Court should affirm the circuit court's judgment in all respects.

II. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

The Murphys initiated this action by filing their original complaint against Appellees Dr. Laura Miller, D.O., Dr. John Battaglino, M.D., Dr. Burech, Wheeling Hospital, Inc. and Medical Park Physician Associates in the Circuit Court of Ohio County on October 25, 2004. The original complaint contained claims of negligence causing injury to the Murphys' child at or around the time of his birth against each Appellee.

On August 9, 2005, the Murphys moved to file an amended complaint adding the West Virginia University Hospitals and the Board of Governors as Defendants. The circuit court granted that motion, and Appellants filed a first amended complaint on or around September 26, 2005.

Thereafter, the Murphys moved to file a second amended complaint adding Pediatric Care as a Defendant on May 26, 2006. The circuit court granted that motion as well, and Appellants filed a second amended complaint on or around August 21, 2006. Like the original complaint, the second amended complaint contains claims of negligence against each Appellee, including the Board of Governors.

On September 19, 2006, the circuit court held a hearing on several pending motions, including a motion to compel the production of opinions held by Dr. Balducci, Appellants' expert on the issue of maternal-fetal medicine. At the hearing, counsel for Appellants argued that despite the fact that a settlement had been reached with the obstetrician Appellees in this action,[1] Dr. Balducci's opinions as disclosed in his report were still relevant and that no

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[1] On November 15, 2006, the circuit court entered an order dismissing the claims against Dr. Miller, Dr. Battaglino and Wheeling Hospital with prejudice following their settlement with

supplementation was necessary. The circuit court held that Dr. Balducci would be limited to only those opinions set forth within his report, including a causation opinion that the problems that the child suffered could have been avoided had the birth occurred earlier. The circuit court warned Appellants' counsel that if they were going to limit themselves to Dr. Balducci's report, then he would not be permitted to deviate from his report. *See* Tr. Pp. 41-42 (Sept. 19, 2006).

Trial commenced on Monday, February 26, 2007, with *voir dire* and jury selection taking most of the first day. Appellants challenged several prospective jurors for cause although Terry Bennett was not among them. The circuit court denied motions to strike Kevin Heilman and Dr. Donald Walter, stating its reasons for not finding cause on the record. Tr. Vol. 1, pp. 61-62, 295. Appellants exercised peremptory strikes on both Mr. Heilman and Dr. Walter, and they were excused from the jury panel. Tr. Vol. I, pp. 312-13.

At the end of the first day of trial, Appellants orally moved *in limine* to exclude the videotaped deposition of Dr. Balducci, who resides in Arizona. Tr. Vol. I, p. 316. While the circuit court deferred ruling on the issue, it reminded the parties that causation is an issue and that it would be fundamentally unfair to disallow exploration of that issue. Tr. Vol. I, p. 324.

On Tuesday, February 27, 2007, the circuit court entered an order granting summary judgment to West Virginia University Hospitals.[2] The trial proceeded against the remaining Appellees Dr. Burech, Pediatric Care[3] and the Board of Governors. Before opening arguments,

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Petitioners.

[2] Although the order dismissing West Virginia University Hospitals was entered on the second day of trial, the circuit court made its ruling before trial. *See* Tr. Vol. I, p. 3.

[3] The claim against Pediatric Care, which was Dr. Burech's employer at all relevant times, was based a theory of vicarious liability. The parties entered into a stipulation that kept

the circuit court held that it would permit videotaped deposition testimony from Dr. Balducci concerning a time line relevant to causation. The circuit court held that there could be no reference directly or by implication as to other health care providers or the fault of other health care providers. The circuit court indicated that at the time the deposition transcript was played it would consider a cautionary instruction if Appellants requested one. Tr. Vol. II, pp. 10-11.[4]

On Thursday, March 1, 2007, Appellants' expert Dr. Condelucci, a life planner, testified. On cross-examination by Dr. Burech, Dr. Condelucci testified that the Murphys' child would be entitled to different types of educational or other public benefits and services in the future. Appellants indicated that they did not object to a few general questions, but that they would object to "a concentration on what really amounts to potential collateral sources[.]" Tr. Vol. IV, p. 53. The circuit court overruled the objection. Tr. Vol. IV., p. 54. Subsequently, Appellants made a continuing objection. Tr. Vol. IV, p. 76. Again, the circuit court ruled that it did not believe that Dr. Burech had "crossed into collateral sources." Tr. Vol. IV, pp. 76-77.

At the close of testimony on Friday, March 2, 2007, the Board of Governors moved for judgment as a matter of law based on the testimony of Appellants' expert Dr. Null. Tr. Vol. V, p. 221. The circuit court took the motion under advisement and deferred a ruling. Tr. Vol. V., p. 228.

On Monday, March 5, 2007, the Board of Governors called Dr. Cicco, a neonatalogist, as an expert witness. On direct examination Dr. Cicco limited his testimony to opinions and

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Pediatric Care off of the verdict form to prevent confusion since there was nothing in the trial regarding that entity. Tr. Vol. VI, p. 296-97.

[4] Petitioners did not request a cautionary instruction when the Dr. Balducci's videotaped deposition was played for the jury or admitted into evidence.

comments on the care that was provided in connection with Nurse Asher's transport of the Murphys' child to the West Virginia University Hospitals. On cross-examination by Appellants, Dr. Cicco was permitted to testify that the standard of care required ordering blood gas more frequently. Tr. Vol. VI, p. 267. Since Dr. Burech would have been responsible for ordering blood gases and since Appellants opened the door, the circuit court held that Dr. Burech could ask Dr. Cicco limited questions regarding whether ordering blood gas more frequently would have made a difference in the outcome. Tr. Vol. VI, p. 277.

At the end of the day on March 5, 2007, the circuit court granted the Board of Governors' motion for judgment as a matter of law as it related to the issue of volume, but not as to the issue of bicarbonate. Tr. Vol. VI, pp. 287-88. The circuit court submitted the remaining issues to the jury.

On Tuesday, March 6, 2007, the jury returned a verdict for Appellees on all remaining issues.

On March 16, 2007, Appellants filed a post-trial motion pursuant to West Virginia Rule of Civil Procedure 59. The motion was briefed by the parties, and the circuit court heard oral argument on May 7, 2007. The circuit court entered an order denying Appellants' motion on May 11, 2007.

Following several extensions of time, the petition for appeal was filed in the circuit court on October 31, 2007.

III. STATEMENT OF THE FACTS

Prior to trial, Appellants' alleged common claims against both Appellees were that Dr. Burech should have ordered the administration of a "volume expander" as well as bicarbonate to

respond to metabolic acidosis in the Murphys' child. Appellants alleged that the Board of Governors, through Nurse Asher had some corresponding duty to "instruct" (equating to order) Dr. Burech to administer these medications at the time of a 10:00 p.m. telephone call that Dr. Burech placed to West Virginia University Hospitals requesting transport and transfer of the Murphys' child to that institution. As shown in the facts below, these pretrial allegations and presentation of Appellants' counsel ultimately did not mesh with the actual opinions elicited under cross-examination of Appellants' standard of care expert, Dr. Null.

In May 2002, Mrs. Murphy started treating with Dr. Miller, a Wheeling-area family practice physician with obstetrics privileges at Wheeling Hospital for prenatal care. Later, Dr. Miller further consulted with a board-certified obstetrician, Dr. Battaglino, for further assistance and advice.

In November 2002, induction was scheduled by Dr. Miller at Wheeling Hospital after near term amniocentesis was performed confirming fetal lung maturity. Mrs. Murphy was admitted to Wheeling Hospital on two separate occasions, approximately one week apart. The first admission for induction occurred from November 18 through 20, 2002, ending with a failure to progress despite cervical ripening and attempts to induce labor. The second admission of November 25 through 26, 2002, resulted in the delivery of the Murphys' child via C-Section at 9:08 p.m. The C-section was performed during the early evening hours of November 26, 2002, with the assist of vacuum extraction.

Unfortunately, the Murphys' child was severely depressed at birth and was virtually lifeless for six to ten minutes. He required lengthy and vigorous resuscitation efforts within the operating suite, including mask-bag ventilation, before he experienced his first gasp at six

minutes after birth with spontaneous respirations not occurring until ten minutes after birth. After this initial resuscitation, the Murphys' child was taken to the Wheeling Hospital Neonatal Intensive Care Unit ("NICU") for further evaluation and monitoring. Shortly after birth, Dr. Miller consulted Dr. Burech, a Wheeling pediatrician to provide care to the Murphys' child. Given the late hour, Dr. Burech was at home when he received the telephone call. He proceeded straight to Wheeling Hospital arriving at approximately 9:30 p.m. that same night. Tr. Vol. V, pp. 149-50.

Upon his arrival, Dr. Burech found the Murphys' child in the Wheeling Hospital NICU and performed his personal evaluation and assessment. After concluding his assessment, in his own handwriting, he wrote Orders (sometimes referred to as "Order #10" at trial) timed at 10:00 p.m. taking into account the clinical presentation of the Murphys' child. *Id.*

In the 10:00 p.m. Orders, among the myriad issues he was addressing, with respect to interventions that are germane to this case, Dr. Burech ordered oxygen (which had been provided since the birth of the Murphys' child). He further recognized that the Murphys' child's initial 9:35 p.m. arterial blood gas ("ABG") indicated some level of a metabolic acidosis. Tr. Vol. V, pp. 161–62. As such, Dr. Burech's 10:00 p.m. Order initially included an order for a volume expander, albumin. Tr. Vol. V, p. 178. With respect to the use of bicarbonate, Dr. Burech did not believe that its use was warranted at that point in time and decided against it. Tr. Vol. V, p. 164.

Dr. Burech also recognized that the Murphys' child would require the services and care of a tertiary care hospital, such as West Virginia University Hospitals' NICU. Accordingly, Dr. Burech telephoned the West Virginia University Hospitals NICU to request transport of the

Murphys' child to their department. During the telephone call, Dr. Burech spoke with Nurse Asher, and information was exchanged between these two individuals. Tr. Vol. II, p. 98; Tr. Vol. V, pp. 172-73.

More specifically, during the telephone call, after hearing the results of the 9:35 p.m. blood gas Nurse Asher offered her opinion that Doctor Burech should consider ordering the administration of bicarbonate, volume and generous oxygen to treat reported metabolic acidosis in the Murphys' child. At trial, as the first witness called by Appellants under adverse examination, Nurse Asher steadfastly maintained that she mentioned these possible options to Dr. Burech for his consideration. Tr. Vol. II, pp. 98, 112. Conversely, Dr. Burech testified at trial that he was not informed of this advice or opinion of Nurse Asher. In any event, Dr. Burech did recognize that Nurse Asher simply could not "order" him to do any particular intervention and that until Nurse Asher's physical arrival at Wheeling Hospital he was responsible for the care of the infant. Tr. Vol. II, p. 249. He did concede, however, that given the condition of the Murphys' child at 10:00 p.m. these would have been reasonable topics that could have been discussed. Tr. Vol. II, p. 250.

With this factual backdrop established during Appellants' case-in-chief, their own neonatology expert, Dr. Null, testified as to the standard of care. Dr. Null opined that any role of Nurse Asher, at 10:00 p.m. while still in Morgantown, was limited to advising or recommending options to consider as opposed to being able to "order" Dr. Burech to undertake any particular course of action. Tr. Vol. III, p. 116.

Critically, Dr. Null testified that regardless of any "advisory" role, Dr. Burech as the attending pediatrician remained responsible for the care of the Murphys' child until the physical

arrival of Nurse Asher and the transport team at Wheeling Hospital when care would be tendered to them. Tr. Vol. III, at pp. 116-17. Dr. Null did nothing to support Appellants' attempts to portray Dr. Burech as a pediatrician who was somehow ill-equipped to manage the Murphys' child. To the contrary, Dr. Null testified that Dr. Burech, a board-certified pediatrician, is required under the standard of care to know how to conduct a neonatal resuscitation, which "absolutely" includes knowing how and when to treat a metabolic acidosis. Tr. Vol. III, p. 115.

Dr. Null further clarified Nurse Asher's advisory role as only obligating her to advise options that have not already been considered. In other words, Dr. Null acknowledged that there are times when a patient such as the Murphys' child is "taken care of" and that a neonatal nurse is, therefore, relieved of any obligation to advise or even mention treatments or options already considered. Tr. Vol. III, p. 118. Additionally, Dr. Null testified that, more likely than not, the order for volume was in effect at the time of the telephone call between Nurse Asher and Dr. Burech. As such, because the Murphys' child was seemingly "taken care of" he conceded that he could not offer an opinion that she deviated from the standard of care with respect to advising the potential use of volume. Tr. Vol. III, pp. 119-21. Dr. Burech testified that he is "certain" the order for volume was in effect at the time of the 10:00 p.m. telephone call and that it was canceled by him later. Tr. Vol V, p. 178.

Finally, similar to the Appellants' argument that Nurse Asher should have "ordered" or otherwise been able to tell Dr. Burech what to do, Dr. Null once again would not support Appellants' representations with respect to the use of bicarbonate. Dr. Null simply testified that while he would have ordered the use of bicarbonate, the standard of care did not require its use at or around 10:00 p.m. Tr. Vol. III, p. 83.

Returning to the medical facts, Nurse Asher and the transport team arrived at Wheeling Hospital *via* ambulance shortly before midnight on November 26, 2002. Upon arrival, Nurse Asher found the Murphys' child to be "grunting and flaring" and in respiratory distress. At approximately the same time as Nurse Asher's arrival at Wheeling Hospital, a new blood gas result was reported, which showed a deteriorating condition when compared to the initial earlier blood gas reading. She then provided volume (albumin) and bicarbonate (2 separate doses). Nurse Asher reported that the Murphys' child responded well to these interventions with the grunting and flaring ceasing approximately fifteen minutes after the bicarb treatment. After briefly speaking with the Murphys, the transport team then left Wheeling Hospital and admitted the Murphys' child to the West Virginia University Hospitals NICU at approximately 2:00 a.m. The Murphys' child was admitted to West Virginia University Hospitals where he remained in the NICU for approximately one month. All testimony at trial was such that Nurse Asher complied with the standard of care in all respects in providing this care as well as the care that transpired at the West Virginia University Hospitals over the next twenty-eight day period. Tr. Vol. III, pp. 113-14.

IV. STATEMENT OF THE ISSUES

A. Whether the circuit court properly exercised its discretion by denying Appellants' motion for a new trial after the jury rendered a verdict for Appellees in this medical malpractice action where (a) the circuit court did not err by allowing Appellees two peremptory challenges each because their interests were antagonistic or hostile; (b) the circuit court did not err by failing to strike three prospective jurors for cause because they were not biased and/or not challenged; (c) the circuit court did not err by admitting the deposition testimony of Appellants' expert Dr.

Balducci because it was evidence supporting the defense theory of causation; (d) the circuit court did not err by admitting limited testimony from the Board of Governors' expert Dr. Cicco regarding causation because Appellants opened the door to such opinions, which were elicited by Dr. Burech; and (e) the circuit court did not err by admitting cross-examination of Appellants' expert Dr. Condelucci, a life care planner, as to educational or other public benefits and services available because such are not impermissible collateral sources.

B. Whether the circuit court properly granted a partial judgment as a matter of law to the Board of Governors, holding that there was no evidence that Nurse Asher deviated from the standard of care concerning volume based on the unequivocal testimony of Appellants' expert Dr. Null.

V. STANDARD OF REVIEW

This action involves an appeal from an order denying a motion for a new trial pursuant to West Virginia Rule of Civil Procedure 59, following an adverse jury verdict. The West Virginia Supreme Court of Appeals has long held that "the ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, [and] the trial court's ruling will be reversed on appeal when it is clear that the trial court has acted under some misapprehension of the law or the evidence." *Sanders v. Georgia-Pacific Corp.*, 159 W. Va. 621, 225 S.E.2d 218, Syl. Pt. 4 (1976). As this Court explained in *Tennant v. Marion Health Care Found., Inc.*, 194 W. Va. 97, 459 S.E.2d 374 (1995):

> We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.

Id., 459 S.E.2d at 381.

In addition, this action involves an appeal from the grant of a partial judgment as a matter of law pursuant to "West Virginia Rule of Civil Procedure 50." In *Brannon v. Riffle,* 197 W. Va. 97, 475 S.E.2d 97 (1996), this Court has held:

> The appellate standard of review for the granting of a motion for a directed verdict pursuant to Rule 50 of the West Virginia Rules of Civil Procedure is de novo. On appeal, this court, after considering the evidence in the light most favorable to nonmovant party, will sustain the granting of a directed verdict when only one reasonable conclusion as to the verdict can be reached. But if reasonable minds could differ as to the importance and sufficiency of the evidence, a circuit court's ruling granting a directed verdict will be reversed.

Id. at Syl. Pt. 3.

VI. DISCUSSION

A. The Circuit Court Did Not Abuse Its Discretion By Denying Appellants' Motion For A New Trial

1. The circuit court did not err by failing to strike three prospective jurors for cause.

The circuit court did not err by failing to strike three prospective jurors for cause because they were not biased and/or not challenged. West Virginia Rule of Civil Procedure 47(a) provides as follows:

> *Examination of jurors.* – The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.

The West Virginia Supreme Court of Appeals has determined that trial judges are accorded great discretion in deciding whether a potential juror should be excused for cause. *See, e.g., State v. McMillion*, 104 W. Va. 1, 138 S.E. 732 (1927) (holding that the question of juror qualification is one of mixed law and fact, and findings of trial judge will not be set aside unless

error is plainly manifest). This Court defers to a trial judge's rulings regarding the qualifications of jurors because the trial judge is able to personally observe the juror's demeanor, assess his or her credibility, and inquire further to determine the juror's bias and/or prejudice. Thus, this Court has held:

> Where the questions propounded by the trial court are sufficient to test a juror's ability to completely disregard anything he may have heard and read about the case, and to give the defendant a fair and impartial trial, and his answers are so unequivocal and satisfactory as to convince the trial judge of the juror's fairness and impartiality, it is the settled practice not to interfere with the court's finding, unless clearly against the evidence.

State v. Toney, 98 W. Va. 236, 127 S.E. 35, Syl. Pt. 1 (1925).

In other words, a trial judge may rely upon his self-evaluation of allegedly biased jurors when determining actual juror bias. The trial judge is in the best position to determine the sincerity of a juror's pledge to abide by the court's instructions. Therefore, this Court should give the trial judge's assessment great deference. *State v. Salmons*, 203 W. Va. 561, 509 S.E.2d 842 (1998). *See also State v. Miller*, 197 W. Va. 588, 476 S.E.2d 535, Syl. Pt. 6 (1996) (holding that challenging party bears burden of proof and that appellate court should not interfere with trial court's discretionary ruling on juror's qualification to serve because of bias only when it is left with clear and definite impression that prospective juror would be unable faithfully and impartially to apply law).

In *State v. Tommy Y.*, 219 W. Va. 530, 637 S.E.2d 628 (2006), this Court held:

> [W]hen a defendant has knowledge of grounds or reason for a challenge for cause, but fails to challenge a prospective juror for cause or fails to timely assert such a challenge prior to the jury being sworn, the defendant may not raise the issue of a trial court's failure to strike the juror for cause on direct appeal.

Id. at Syl. Pt. 5. *See Thomas v. Makani*, 218 W. Va. 235, 624 S.E.2d 582, 586 (2005) (per

curiam) (holding that appellant waived right to allege error with respect to two jurors she did not move to strike for cause); *Proudfoot v. Dan's Marine Serv., Inc.*, 210 W. Va. 498, 558 S.E.2d 298 (2001) (holding that party challenging verdict based on presence of disqualified juror must timely object to receive new trial).

In *Thomas,* this Court held that the circuit court properly refused to allow three potential jurors who had been treated by a defendant in a medical malpractice case to be stricken for cause. In that case, the plaintiff contended that three jurors were biased in favor of the defendant and that the circuit court abused its discretion by not removing those jurors for cause from the jury panel. With respect to the first juror, the plaintiff argued that his answers to questions posed during individual *voir dire* clearly showed that he was biased in favor the defendant. The Court disagreed, reasoning as follows:

> In this case, the trial court, in accordance with *O'Dell [v. Miller*, 211 W. Va. 285, 565 S.E.2d 407 (2002)], did, in fact, question Juror Evans further to determine whether he was capable of rendering a fair verdict. At that point, Juror Evans clarified his earlier statement that he might possibly "lean toward" [the defendant]. He explained that since he had no medical knowledge, he would more likely believe the doctor who presented the most credible and convincing evidence. He clearly stated that he would not find in favor of [the defendant] simply because he had treated him fourteen years ago.

Thomas, 624 S.E.2d at 585-86.

With respect to the second and third jurors, the Court held that the issue was waived because the plaintiff did not move to strike either of these jurors for cause.

Similarly, the circuit court in this action did not err in failing to strike three prospective jurors for cause. Each of these jurors will be discussed in turn.

a. **Kevin Heilman was not biased.**

The first juror of whom Appellants complain, Mr. Heilman, is a chemist. Mr. Heilman

stated as follows in response to questions from Appellants' counsel:

> MR. COHEN: [N]egligence is a deviation from the standard of care. Standard of care is what a normal and reasonable and prudent doctor would do under like circumstances. If a doctor is well-intentioned, in your mind, wants to do the best he can do, but doesn't comply with the standard of care and someone is hurt as a result of that, under that circumstance, would you feel uncomfortable making the doctor pay?
>
> PROSPECTIVE JUROR HEILMAN: No, I wouldn't feel uncomfortable, but I also need to have the definition of standard of care defined to me. I mean, once again, doctors go out of books for everything they do. Now, you know, in emergencies, if it's an emergency, I don't think there's a book that you write emergency practice about. I'm sure they have something like that, but could I make a doctor pay if I thought that they were doing the right thing, if I thought that they thought they were doing the right thing? It's difficult for me to make them.
>
> MR. COHEN: Even if it wasn't the right thing, if they thought it was the right thing?
>
> PROSPECTIVE JUROR HEILMAN: If they thought it was the right thing, I couldn't, no. I couldn't make them pay for people come to prove to me that it was the – was not the right thing. It would have to be proven to me. In other words, you have to bring some evidence to tell me he was negligent.

Tr. Vol. I, pp. 277-78.

Mr. Heilman responded as follows to the circuit court's questioning:

> THE COURT: Mr. Heilman, I just had one clarification. If you believed that the evidence demonstrated that the doctor or the hospital was negligent, but not necessarily grossly negligent or did anything to intentionally harm the child, do you believe that you could return a verdict against either the hospital or the doctor? In other words, you –
>
> PROSPECTIVE JUROR HEILMAN: So in other words, this is, oh, I think he didn't do the right procedure, but evidence would –
>
> THE COURT: Evidence demonstrates negligence, but not gross negligence or an intentional act?
>
> PROSPECTIVE JUROR HEILMAN: That's a good question. Yes.

Tr. Vol. I, pp. 291-92.

The circuit court properly exercised its discretion in holding that Mr. Heilman should not be disqualified for cause, reasoning as follows:

> [A]fter hearing his answers and taking all things into consideration, I'm going to go ahead and leave him. He does have his opinions, but what I was impressed by is that he kept coming back to, it would depend on the circumstances, it would have to be proven to him. But if it was proven, he said he could award money and he would not be uncomfortable making a doctor pay if he deviated. And the Court is also particularly impressed with the answer he gave – his last answer to my question regarding the clarification I sought concerning the negligence question.

Tr. Vol. I, p. 295.

In any event, Appellants exercised a peremptory strike on Mr. Heilman, and he was excused from the jury panel. Tr. Vol. I, p. 312-13.

b. **Dr. Donald Walter, a dentist, was not biased.**

Appellants also complain about, Dr. Walter, a dentist. Although he has a background that is peculiar to his profession, his *voir dire* did not disclose any information to disqualify him for cause. In fact, in response to the written questionnaire, which was submitted to the panel of jurors, Dr. Walter stated that people should be able to sue for damages if the are injured, that health care workers should be held to the same legal standards as other businesses and individuals and that doctors should be held responsible for medical mistakes. Dr. Walter specifically said that he could find a hospital and a doctor negligent and return a verdict against a hospital and a doctor after hearing all the evidence. Tr. Vol. 1, p. 60.

Contrary to Appellants' argument, Dr. Walter did not show disdain for medical malpractice cases. The questioning by Appellant in that regard actually went as follows:

> MR. COHEN: Dr. Walter, being a member of the medical community, could you tell us what you think about medical malpractice lawsuits.

PROSPECTIVE JUROR WALTER: How much time do you have.

(Laughter.)

MR. COHEN: As the Judge pointed out, we do have a lot of time. It's a long process. I hope you'll be candid with us.

PROSPECTIVE JUROR WALTER: I don't know. It's kind of hard to say. I know there's a need for some of them. I just know there's a lot of frivolous lawsuits that are placed. I'd say over, what, 50, 60 percent of frivolous lawsuits are settled out of court.

MR. COHEN: What do you think about the 40 percent in your mind that aren't frivolous?

PROSPECTIVE JUROR WALTER: Well, I think those are, you know, probably justified.

Tr. Vol. I, pp. 46-47.

In addition, although Mr. Walter stated when questioned by Appellants that "it would be a tough concept to figure out how much money is needed for pain and suffering," he further stated that he did not have a dollar figure in mind as a limit. Tr. Vol. I, pp. 49-50.

The circuit court properly exercised its discretion in holding that Dr. Walter said nothing in *voir dire* to require disqualification for cause, reasoning as follows:

> [W]hile it's . . . obvious that Mr. Walter has some opinions or beliefs, I don't think it rises to the level of cause. What I keep coming back to is at the end of the day, he did state a few times that notwithstanding whatever opinions or beliefs he may have, he would do what he felt was justified, based on the evidence and the law given to him in court. He stated that he – I believe he stated that he has no dollar figure in mind as to a limit, that he would follow the instructions of law, notwithstanding whatever beliefs he has. And he stated that he could apply the facts and law to the case that's before him. He also stated that he doesn't believe that the medical profession should be any less accountable than other litigants.
>
> So for those reasons, I will deny the motion.

Tr. Vol. 1, p. 61-62.

In any event, Appellants exercised a peremptory strike on Dr. Walter, and he was

excused from the jury panel. Tr. Vol. I, p. 312-13.

c. **Terry Bennett, an employee of Wheeling Hospital, was not biased and was not challenged.**

Appellants also complain about Terry Bennett, who is an employee of Wheeling Hospital, which although an original Defendant in this action, was not a party at the time of trial.[5] Although she testified that she was biased in favor of Wheeling Hospital, she testified that she would not be biased in favor of Appellees. The following questioning by Appellants' counsel illustrates that fact as follows:

> MR. COHEN: I'm sorry, I misunderstood what you said in [response to question] 59. Do you feel your background would – I mean, could you be a fair juror in this case where the defendant is Dr. Burech and another defendant is – has to do with West Virginia University Hospital, could you be a fair juror?
>
> PROSPECTIVE JUROR BENNETT: I would say yes.
>
> . . .
>
> MR. COHEN: Okay. All right. So when you were saying you couldn't be a fair juror, you just meant only if Wheeling Hospital was a defendant?
>
> PROSPECTIVE JUROR BENNET: I would say yes.

Tr. Vol. I, pp. 100-01.

Appellants did not challenge Ms. Bennett for cause. In fact, they affirmatively stated on the record that they had no objection. Accordingly, they waived any issue regarding a challenge for cause under *Thomas.*[6] Even the plain error rule should not apply. *See State v. Donley*, 216

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[5]There is no indication that Ms. Bennett knew that Wheeling Hospital was ever a Defendant in this action.

[6]Appellants' argument to the effect that a challenge for cause would have been futile is specious. Immediately following the circuit court's ruling on the challenge to Dr. Walter, Appellants challenged Joseph Puskarich for cause. The circuit court granted Appellants' motion

W. Va. 368, 607 S.E.2d 474, 480 (2004) (holding that existence of affirmative waiver of right to object on issue of juror prejudice precludes review under even plain error doctrine).

This action is readily distinguishable from *O'Dell v. Miller*, 211 W. Va. 285, 565 S.E.2d 407 (2002), upon which Appellants rely. In *O'Dell*, this Court based its decision reversing the circuit court's refusal to excuse the prospective juror on the fact that the prospective juror had both an attorney-client relationship with defense counsel and a doctor-patient relationship with the defendant. *Id.*, 565 S.E.2d at 412-13. The Court held that although there exists no *per se* disqualification of prospective jurors who know the parties or their attorneys, a circuit court is obligated to strike "prospective jurors who have a significant past or current relationship with a party or a law firm." *Id.*, 565 S.E.2d at 413. The Court concluded that in that case prospective juror's close association with both the defendant and his lawyer led to a presumption of impermissible bias. *Id.* at Syl. Pt. 1. In this action by contrast, there exists no relationship between the venire panel members at issue and any of the parties or their counsel. Thus, the holding in *O'Dell* simply is inapposite.

2. The circuit court did not err by allowing Appellees two peremptory challenges each.

The circuit court did not err by allowing the Board of Governors and Dr. Burech two peremptory challenges each because their interests in this action are antagonistic or hostile. West Virginia Rule of Civil Procedure 47(b) provides as follows:

> *Jury selection.* – Unless the court directs that a jury shall consist of a greater number, a jury shall consist of six persons. The plaintiff and the defendant shall each have two preemptory [sic] challenges which shall be exercised one at a time, alternately, beginning with the plaintiff. Several defendants or several plaintiffs

with respect to Mr. Puskarich.

> may be considered as a single party for the purpose of exercising challenges, may allow additional peremptory challenges and permit them to be exercised separately or jointly.

Rule 47(b) provides a circuit court discretion to allocate additional peremptory challenges when more than one plaintiff or defendant is present in a case. For example, when a single plaintiff faces several defendants the circuit court may allow the defendants additional peremptory strikes, which may be exercised jointly or separately. *See Price v. Charleston Area Med. Ctr., Inc.*, 217 W. Va. 663, 619 S.E.2d 176, 181 (2005). *See also* Franklin D. Cleckley, Robin Jean Davis, *et al.*, *Litigation Handbook on West Virginia Rules of Civil Procedure* § 47(b).

In *Price*, this Court held:

> In the determination by the trial court of the number of peremptory challenges to be allowed two or more plaintiffs or two or more defendants pursuant to Rule 47(b) . . . , plaintiffs or defendants with like interests are ordinarily to be considered as a single party for the purpose of allocating the challenges. Where, however, the interests of the plaintiffs or the interests of the defendants are antagonistic or hostile, the trial court, in its discretion, may allow the plaintiffs or the defendants separate peremptory challenges, upon motion, and upon a showing that separate peremptory challenges are necessary for a fair trial.
>
> In determining whether the interests of two or more plaintiffs or two or more defendants are antagonistic or hostile for purposes of allowing separate peremptory challenges under Rule 47(b) . . . , the allegations in the complaint, the representation of the plaintiffs or defendants by separate counsel and the filing of separate answers are not enough. Rather, the trial court should also consider the stated positions and assertions of counsel and whether the record indicates that the respective interests are antagonistic or hostile. In the case of two or more defendants, the trial court should consider a number of additional factors including but not limited to: (1) whether the defendants are charged with separate acts of negligence or wrongdoing, (2) whether the alleged negligence or wrongdoing occurred at different points of time, (3) whether negligence, if found against the defendants, is subject to apportionment, (4) whether the defendants share a common theory of defense and (5) whether cross-claims have been filed. To warrant separate peremptory challenges, the plaintiffs or defendants, as the case may be, as proponents, bear the burden of showing that their interests are

antagonistic or hostile and that separate peremptory challenges are necessary for a fair trial.

Price, 619 S.E.2d at Syl. Pts. 3 & 4.

In *Price*, the Court cited with approval the Supreme Court of Kentucky's decision in *Sommerkamp v. Linton*, 114 S.W.3d 811 (Ky. 2003). In *Sommerkamp*, the trial judge allowed each co-defendant in a medical malpractice case to exercise four peremptory challenges. *Id.* at 815-16. The intermediate court of appeals reversed the trial judge's judgment, observing that the interests of the co-defendants were not so disparate and distinct as to render them antagonistic for the purposes of the rule on peremptory challenges. *Id.* at 816. The Supreme Court reversed the intermediate court of appeals, reasoning that "the rule does not require the defendants to demonstrate a certain degree of antagonism, but *only the existence of antagonism* between the various healthcare providers at the time of jury selection, in order to permit separate peremptory challenges." *Id.* In a passage partially quoted by this Court in *Price*, the Supreme Court stated:

> The Court of Appeals should not substitute its judgment for that of the trial judge in determining whether antagonistic interests exist for the purpose of awarding peremptory challenges in the absence of an abuse of discretion. Here, the trial judge reached a well-reasoned decision based on established precedent, and there is no basis for a finding of abuse of discretion or any clear error. The trial judge held a pretrial conference on the issue of peremptory challenges and made a specific finding that the antagonism existed between the defendants. The trial judge based his decision on a number of factors that weighed in favor of antagonism. The defendants were charged with separate acts of negligence, were represented by separate counsel and had individual theories of the case and apportionment of fault issues. These reasons were set out in an order issued to all parties.

Id. at 814-15. *See Price*, 619 S.E.2d at 183-84.

The Supreme Court of Kentucky has reached similar conclusions in *Bowman v. Perkins*, 135 S.W.3d 399 (Ky. 2004), and *Bayless v. Boyer*, 180 S.W.3d 439 (Ky. 2005). In *Bowman*, the

trial judge allowed two co-defendants separate peremptory challenges in a medical malpractice case. The intermediate court of appeals affirmed, reasoning as follows:

> We believe that the requirement that the parties be antagonistic does not preclude their being in agreement on some points of proof. This was not a case of identical trial positions. Because [Bowman] sought to show that Dr. Perkins administered Decadron LA as a result of a policy or pattern of giving that medication to children in Dr. Moses' medical office, appellees were placed in opposition to each other. It became necessary for Dr. Moses to disclaim responsibility for the actions taken by Dr. Perkins in the event Dr. Perkins was found to have deviated from the standard of care. If Dr. Moses could show that there was no issue of agency in his relationship with Dr. Perkins, he had no need to establish that Dr. Perkins' actions were within the standard of care. At trial, Dr. Moses plainly attempted to distance himself from the medical decisions of Dr. Perkins by establishing that Dr. Perkins was in charge of his own medical practice and did not take instruction from Dr. Moses.

Bowman, 135 S.W.3d at 401.

The Supreme Court agreed with the intermediate court of appeals and expressly adopted its rationale. *Id.*

In *Bayless*, the trial judge held that two co-defendants in a medical malpractice case were entitled to separate peremptory challenges. *Bayless*, 180 S.W.3d at 447. Both the intermediate court of appeals and the Kentucky Supreme Court affirmed the trial judge's judgment. *Id.* at 448. The Supreme Court reasoned as follows:

> Appellants have provided no specific rationale for reversing the trial court on this issue and rely instead on a general objection that the Appellees pursued a common defense strategy throughout the trial. Appellees have each noted several instances during the trial which demonstrated their antagonistic interests. That being said, there is no need to recount each of those instances here. . . . [A] trial court's ruling [on peremptory challenges] . . . is necessarily made prior to trial and a review of that decision need not focus on what actually occurred during the proceedings.

Id. See also Marshall v. Hartford Hosp., 65 Conn. App. 738, 783 A.2d 1085 (2001) (holding that there was no unity of interest between co-defendants in medical malpractice case, such that

they were entitled to separate peremptory challenges); *Bernal v. Lindholm*, 133 Ohio App. 3d 163, 727 N.E.2d 145 (1999) (holding that co-defendants in medical malpractice case did not have identical interest and thus each was entitled to separate peremptory challenges).

In this action, the circuit court concluded that his review of the record supported the allowance of separate peremptory challenges as follows:

> There is sufficient adversity between the defendants; there's separate counsel; there's separate theories set out against each defendant within plaintiffs' complaint; separate answers were filed. It's my recollection that the defendants each have their own experts. The defendants, I believe, are on different sides of the same issue, which is, at least in my estimation, a rather critical issue in this case. The Board of Governors and Dr. Burech, I believe, have a conflict between themselves and their respective positions, as well as their respective recollections of the events that lead us hear today. And, therefore, I do not believe that the defendants share a common defense theory between them, enough to warrant the Court ordering them to share strikes.

Tr. Vol. 1, p. 9.

The evidence upon which the circuit court relied is more than enough to demonstrate antagonism and hostility warranting separate peremptory strikes. It should be observed, however, that Appellants were keenly aware of the antagonism and attempted to use it to their advantage. For example, Appellants made the following argument in response to the Board of Governors' motion for summary judgment:

> Briefly, Defendant Dr. Burech claims that after the delivery of the minor-Plaintiff, he called Defendant BOG for help, but he did not receive the proper medical instruction. Defendant BOG denies this; asserting that it gave the right instructions. Defendant Burech responds by adding that had he received proper instruction, he would have treated the minor-Plaintiff accordingly. The Plaintiffs' experts have testified that, the resolution of the dispute is for the jury.

Pls.' Reply to Mot. Summ. J. of Def. W.V.U. Bd. of Govs., p. 1.

Thus, this action is very similar to *Bowman*. Like the doctors who were co-defendants in

that case, Nurse Asher plainly attempted to distance herself from the medical decisions of Dr. Burech by establishing that Dr. Burech was in charge of his own medical practice and did not take instructions from Nurse Asher. As in *Bowman,* the requirement that the parties be antagonistic does not preclude their being in agreement on some points of proof.

Moreover, Appellants' argument in this Court is wholly without merit because it relates solely to the events at trial.[7] As the Kentucky Supreme Court recognized in *Bayless*, a circuit court's ruling on peremptory challenges is necessarily made prior to trial and a review of that decision should not focus on what actually occurred during the trial.

In any event, contrary to Appellants' argument on page nineteen of their brief, there was evidence of antagonism or hostility during trial. For example, as mentioned above and discussed further below the Board of Governors' expert Dr. Cicco testified on cross-examination by Appellants that Dr. Burech violated the standard of care by not ordering a blood gas more frequently. Tr. Vol. VI, p. 267. Based on that testimony, Dr. Burech was permitted to elicit Dr. Cicco's opinion that such breach did not cause the injuries to the Murphys' child. Tr. Vol. I, pp. 277-78.

This Court should refuse to substitute its judgment for that of the trial judge in determining whether antagonistic interests exist for the purpose of awarding peremptory challenges in the absence of an abuse of discretion. Clearly, the circuit court did not abuse its discretion in this action.

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[7] Indeed, Appellants detail the antagonistic or hostile position between Dr. Burech and Nurse Asher pre-trial on pages two through four of the Appellants' brief. While Appellees do not agree with all of the facts as stated by Appellants, it is clear by all accounts that at the time the circuit court ruled on peremptory challenges Dr. Burech and Nurse Asher were in antagonistic or hostile positions.

3. The circuit court did not abuse its discretion by admitting the deposition testimony of Dr. Balducci.

The circuit court did not abuse its discretion in admitting the deposition testimony of Appellants' expert Dr. Balducci, an obstetrician, because it was evidence supporting the defense theory of causation. Appellants' argument that by allowing Dr. Balducci's testimony, the circuit court allowed the fault of parties who were not in the litigation to be infused into the case in violation of West Virginia Code Section 55-7B-9 is wholly without merit. This Court rejected a similar argument in *Sydenstricker v. Mohan*, 217 W. Va. 552, 618 S.E.2d 561 (2005). In *Sydenstricker*, a mother filed a medical malpractice claim against a physician after he misdiagnosed her child's illness. The circuit court entered judgment on a jury verdict in favor of the defendant and denied a motion for a new trial. On appeal, the mother argued that the circuit court erroneously allowed the introduction of evidence regarding another physician's negligence in treating her child. This Court held that it was not necessary to address the application of Section 55-7b-9(c) because its decision turned on another defense theory – intervening cause. The Court held:

> Evidence that is admissible as to one party or for one purpose may not be excluded merely because it is not admissible for another party or for another purpose. When such evidence is admitted, however, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly as required by Rule 105 of the West Virginia Rules of Evidence.

Id. at Syl. Pt. 1.

The Court reasoned as follows:

> Insofar as intervening cause is a recognized defense in this State, the defense can be established only through the introduction of evidence by a defendant that shows the negligence of another party or a nonparty. Consequently, in order for Dr. Mohan to establish the defense of intervening cause, he had to be allowed to introduce evidence of Dr. Lucero's negligence, even if the evidence was

> inadmissible under *Rowe [v. Sisters of Pallottine Missionary Society*, 211 W. Va. 16, 560 S.E.2d 491 (2001),]as Ms. Sydenstricker contends. Therefore, the trial court did not commit error in allowing such evidence to be introduced for the purpose of establishing the defense of intervening cause.

Id., 618 S.E.2d at 568 (citations omitted).

In this action as well, the circuit court did not abuse its discretion in admitting evidence that the obstetricians' fault was the cause of the injuries to the Murphys' child. In fact, the evidence quoted by Appellants directly supports the causation defense as follows:

> Q. Okay. And then I understand you formed an opinion from the records and your expertise, that the failure to deliver the infant during the November 18th induction and then the four-hour delay and the final decision to perform a C-section on November the 26th is directly related to and caused the baby's condition and outcome –
>
> A. Yes, ma'am.
>
> Q. – is that correct?
>
> A. Yes, ma'am.

Appellants' Brief pp. 8, 24.[8]

Appellants' arguments concerning the use of Dr. Balducci's deposition are without merit. First, at the hearing on the motion to compel held on September 19, 2006, counsel for Appellees merely requested that Appellants supplement Dr. Balducci's expert disclosure. Appellants, for whatever reason, stubbornly refused to do so and stated to the circuit court and counsel that he would testify consistent with this report. Thus, his deposition was taken in the case and Appellants chose not to ask Dr. Balducci any questions during the course of the deposition.

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[8]Contrary to Appellants' argument, nothing in this passage or any other portion of Dr. Balducci's videotaped deposition played for the jury suggested that there had been other parties to this action or that there had been a settlement. The questioning related only to the issue of causation.

Most importantly, however, the Appellants had never withdrawn Dr. Balducci from their expert list -- they were certainly free to call him as a live witness in their case in chief, but decided not to do so. As such, given his unavailability, Appellees exercised their right to play his videotaped deposition.

Appellants' argument that Appellees somehow "reneged" on an earlier offer to stipulate concerning a pre-birth injury is simply not true. Once Appellants realized that their tactic of not supplementing Dr. Balducci's opinions had backfired, they attempted to rectify their plight by appearing reasonable to a stipulation that the injuries sustained by the Murphys' child began before birth. This was certainly true; however, the proposed stipulation would not come close to the causation defense posited by Appellees because they contended that the injuries sustained by the Murphys' child occurred before birth, in their entirety. Dr. Balducci's report supports that contention. Because Appellants would not stipulate in accordance with Dr. Balducci's report, the Board of Governors never agreed.

Finally, Appellants' argument that it was unfairly prejudicial for the jury to learn that Dr. Balducci was retained by the Appellants is also without merit. The basic fact is that Dr. Balducci was Appellants' expert and was not withdrawn. After the dismissal of the obstetrical Defendants, Appellants reaffirmed that they were going to call Dr. Balducci as an expert to testify at trial. Most fundamentally, however, with respect to the admissibility of "who retained Dr. Balducci" is that fact that Appellants opened the door, beginning with the adverse examinations of Nurse Asher, Dr. Mark Polack, M.D. and Dr. Burech, concerning the credibility of who "sponsored" or retained "defense" expert witnesses given their questions to these individuals implying that they were aligning their stories to experts hired by defense counsel.

See, e.g., Tr. Vol. II, pp. 100, 103, 132, 147, 166 & 216. Given this, it would not have been appropriate for the circuit court to allow Appellants to imply or create the sham impression before the jury that Dr. Balducci had actually been retained by one of Appellees.

4. The circuit court did not err by admitting limited testimony from Dr. Cicco regarding causation.

The circuit court did not err by admitting limited testimony from the Board of Governors' expert Dr. Cicco regarding causation because Appellants opened the door to such opinions, which were elicited by Dr. Burech. Appellants' argument that the circuit court improperly allowed Dr. Cicco to testify beyond the scope of his West Virginia Rule of Civil Procedure 26(b)(4) disclosure is without merit. A circuit court has broad discretion to admit expert testimony under West Virginia Rule of Evidence 702. *See, e.g., West Virginia Div. of Highways v. Butler*, 205 W. Va. 146, 516 S.E.2d 769 (1999). This Court has held that any physician qualified as an expert may give an opinion about the physical and medical cause of injury or death. *State v. McKenzie*, 197 W. Va. 429, 475 S.E.2d 521, Syl. Pt. 3 (1996) (*per curiam*). Moreover, this Court has also held that the failure to follow a circuit court's *in limine* ruling is subject to a harmless error analysis. *See Tennant v. Marion Health Care Found., Inc.*, 194 W. Va. 97, 459 S.E.2d 374, 391 (1995).

In this action, the circuit court ordered that Dr. Balducci's testimony would be limited to his report as discussed above. *See* Tr. Vol. II, p. 14. This order was prompted by Appellants' refusal to supplement Dr. Balducci's opinions following the dismissal of the Defendant obstetricians. *See* Tr. pp. 41-42 (Sept. 19, 2006). Contrary to Appellants' argument, the circuit court did not address the scope of other experts' testimony at the time it ruled regarding Dr. Balducci's testimony. Assuming that the circuit court did so rule, however, Appellants opened

the door to limited questioning of Dr. Cicco regarding causation.

The Board of Governors did not elicit causation opinions from Dr. Cicco, despite those opinions (and many others) being explored by Appellants at his deposition. Nevertheless, on cross-examination, Appellants proceeded to elicit another opinion that was not put into evidence on direct examination (but was known and had been explored by Appellants at Dr. Cicco's deposition), concerning Dr. Burech's conduct. Specifically, Appellants had Dr. Cicco offer his opinion that Dr. Burech should have ordered a blood gas more frequently than he did. Tr. Vol. VI, p. 267. Having gone beyond the scope of both Dr. Cicco's report and his direct examination, Appellants opened the door to allow Dr. Cicco's other opinions, including his opinion that the failure to order blood gas more frequently did not cause injury to the Murphys' child. Dr. Burech questioned Dr. Cicco as follows:

> Q. Doctor, in response to the question that Mr. Cohen asked you about whether it was a violation of the standard of care not to order the blood gas more frequently. In forming that opinion, did you also form an opinion as to whether that deviation made any difference in the outcome of this case?
>
> A. Yes.
>
> Q. And what is that opinion, sir?
>
> A. I don't think it made a difference.
>
> Q. Okay. And do you hold that opinion to a reasonable degree of medical certainty?
>
> A. Yes.

Tr. Vol. VI, pp. 277-78.

Dr. Cicco's opinion on causation was known to all parties prior to trial. Indeed, at the same deposition, taken by Appellants, Dr. Cicco testified that while he believed the standard of care would require a more timely blood gas, generally, that the timing of the blood gas was of no

import because he believed the injuries to the Murphys' child had occurred "pre-birth." He then gave a full basis for that causation opinion. Thus, Appellants cannot complain of any surprise that counsel for Dr. Burech then elicited this testimony to balance the standard of care testimony elicited by Appellants. There was certainly no unfair surprise to Appellants on direct examination and Appellants opened the door to the testimony of which they now complain.

In any event, the causation testimony should not be considered error since any physician qualified as an expert may give an opinion about the physical and medical cause of injury or death under *McKenzie*, 475 S.E.2d at Syl. Pt. 3. Moreover, even if the admission of such evidence was error, it was harmless under *Tennant*. Although Appellants claim prejudice, they do not identify any prejudice.

5. The circuit court did not err by admitting evidence that the Murphys' child would be entitled to different types of aid in the future.

The circuit court did not err by admitting cross-examination of Appellants' expert Dr. Condelucci, a life care planner, as to educational or other public benefits and services available because such are not impermissible collateral sources. The collateral source rule precludes the offsetting of payments made by health and accident insurance companies or other collateral sources as against the damages claimed by the injured party. *Ratlief v. Yokum*, 167 W. Va. 779, 280 S.E.2d 584, Syl. Pt. 7 (1981). The rule was established to prevent the defendant from taking advantage of payments received by the plaintiff as a result of his own contractual arrangements entirely independent of the defendant. *Id.*, 280 S.E. at 590. However, even when collateral sources are presented to the jury in error, the error is deemed harmless when the jury finds against the plaintiff on the issue of liability. The error is harmless because the issue of damages, which the collateral source rule was designed to protect, is never reached. *Id.*, 280 S.E.2d at 590;

Keesee v. General Refuse Serv. Inc., 216 W. Va. 199, 604 S.E.2d 449, 457 (2004).

Although the precise issue has not been addressed by this Court, other courts have held that evidence of educational or other public benefits and services available to anyone with specific disabilities does not violate the collateral source rule. For example, in *Shuford v. McIntosh*, 104 N.C. App. 201, 408 S.E.2d 747 (1991), a medical malpractice action was brought on behalf of a child, alleging that he suffered brain damage and other injuries as a result of negligence of the defendants during his mother's pregnancy and delivery. Following a jury trial, judgment was entered in favor of the defendants. On appeal, the plaintiff argued *inter alia* that the defendants' cross-examination of witnesses as to educational or other public benefits and services available to the child violated the collateral source rule. The court of appeals held that the defendants' cross-examination did not violate the collateral source rule because the plaintiffs had opened the door to such testimony. *Id.*, 408 S.E.2d at 750.[9]

Similarly, in *Florida Physician's Insurance Reciprocal v. Stanley*, 452 So. 2d 514 (Fla. 1984), an appeal was taken from judgment in favor of defendants in a medical malpractice action brought by parents alleging that the defendants' negligence caused their child's retardation and cerebral palsy. The intermediate court of appeals reversed, but the Florida Supreme Court quashed that decision and remanded the case for reinstatement of the judgment for the defendants, holding that evidence of free or low-cost services from governmental or charitable agencies available to anyone with specific disabilities was admissible on the issue of future damages and did not violate the collateral source rule. In reaching its decision, the court

[9]It should be noted that the court of appeals also held that the trial court's error in granting the defendants more peremptory challenges than authorized by statute was not reversible. *Id.*, 408 S.E.2d at 749.

considered both the common law and a Florida statutory provision comparable to West Virginia Code Section 55-7B-9a(a) as follows:

> Petitioners claim that evidence of free or low cost services from governmental or charitable agencies available to anyone with specific disabilities is admissible on the issue of future damages. We agree. Such evidence violates neither the statutory nor the common-law collateral source rule and does not, therefore, require a new trial.
>
> The district court correctly found section 768.50, Florida Statutes (1981), inapplicable to the unliquidated future damages at issue here. Section 768.50, which requires the trial court to reduce the jury verdict award in medical malpractice cases by the amount of all collateral source payments available to the plaintiff, only addresses liquidated collateral source payments which have been paid. However, the district court should also have found that the admission in this case of evidence concerning future governmental and charitable services did not violate the common-law collateral source rule.

Stanley, 452 So.2d at 515.

In this action, neither Appellee violated the collateral source rule. Appellants called Dr. Ellen Kitts, the treating physician, who testified by videotaped deposition that the Murphys' child participated in West Virginia's "Birth to Three" program up until his third birthday and is now receiving certain therapies through the public school system. While she has not had to do so presently, Dr. Kitts testified that she would also intervene, as she deemed appropriate, for the Murphys' child to continue to receive therapies through the public school system.

Appellants then proffered the testimony of Al Condelucci, Ph.D., as a life care planning expert. Dr. Condelucci proposed a plan comprised of numerous services and therapies which he felt the Murphys' child should receive. Neither Appellee attempted to present or elicit evidence that the child or his parents had received payments or that any of the benefits or medical care that he received had been paid for by insurance or any other collateral source. Dr. Burech simply had Dr. Condelucci confirm that many of the services that Dr. Condelucci testified that the child

should receive are already available to him by virtue of government programs. This was done to give a fair balance to Dr. Kitts's and Dr. Condelucci's testimony and not to show payments received from collateral sources or to "minimize" any of Appellees' responsibility.

Appellants' argument that presenting collateral sources violated West Virginia Code Section 55-7(B)-9(A) or 55-7B-9(a) is without merit. Neither of those code sections exist. It appears that Appellants intend to cite to West Virginia Code Section 55-7B-9a(a).[10] Section 55-7B-9a(a) reads, in part, "*a defendant who has been found liable to the plaintiff* for damages for medical care, rehabilitation services, lost earnings or other economic losses may present to the court, after the trier of fact has rendered a verdict, but before entry of judgment, evidence of payments the plaintiff *has received* for the same injury from collateral sources." (Emphasis added.) The statute spells out permissible procedures following a jury verdict for the plaintiff on the issue of liability. However, in this action, not only did Appellees not introduced evidence of payments the Murphys have received for their child's injuries, the jury found against the Appellants on the issue of liability in any event.

Not only dies this last fact preclude application of Section 55-7B-9a(a), it also requires application of the harmless error doctrine. Even if this Court finds that the collateral source rule was violated, it should be harmless error, because the jury never reached the issue of damages. Under *Keesee,* even if the collateral source rule is violated, the error is harmless if the jury disposes of the case against the plaintiff on the issue of liability. *Keesee*, 604 S.E.2d at 457. *See*

[10]Appellants did not raise Section 55-7B-9a(a) when they objected at trial. Instead, it was mentioned for the first time in Appellants' post-trail memorandum. Accordingly, this argument should be waived. *See State v. David D. W.*, 214 W. Va. 167, 588 S.E.2d 156, 163 n. 7 (2003) (holding that appellant waived argument on grounds not preserved in record or apparent from face of record).

also Daniel B. by Richard B. v. Ackerman, 190 W. Va. 1, 435 S.E.2d 1 (1993); *Ratlief*, 280 S.E.2d at 590.

B. The Circuit Court Did Not Err In Granting A Partial Judgment As A Matter Of Law To The Board of Governors.

The circuit court did not err in granting a partial judgment as a matter of law, holding that there was no evidence that Nurse Asher deviated from the standard of care concerning volume. West Virginia Rule of Civil Procedure 50(a) provides in relevant part as follows:

> *Judgment as a matter of law.* – (1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

In this action, it was Appellants' expert Dr. Null who testified "that since Order #10 on Dr. Burech's medical Orders for minor-Plaintiff contained an order for volume, which Dr. Burech scratched out, that Nurse Asher was relieved of" an obligation and, hence "liability." Accordingly, this is not a situation where the Court "adopted" a set of facts, let alone a set of facts which were not in evidence -- while Appellants' counsel spoke in terms of various "hypotheticals," counsel conveniently ignores that these were the only actual facts in evidence.

After carefully reviewing the record, the circuit court held:

> The Court's reviewed of the testimony regarding this particular issue [sic] is that plaintiffs' expert, Dr. Null, testified that if the volume order was on the order sheet at the time of the call, then she – "she" being Nurse Asher – had no duty to advise Dr. Burech. He went on to state that his review of the order sheet tells him that more likely than not that volume order was on the sheet at the time Dr. Burech had the phone conversation with Nurse Asher, and he then concluded, in agreement with counsel, that if that was the case, then – well, concluded based on his review of that sheet, that there – that the volume order was on the sheet at the time of the phone call, and that, therefore, there could not be a deviation from the

> standard of care, inasmuch as Nurse Asher had no duty to recommend, advise, instruct, however you wish to characterize it, of something that was already being considered or on the order sheet. The evidence has also been that the order sheet was written at 10:00 o'clock and that the phone conversation took place at or around the same time.
>
> When Dr. Burech was called back to the stand during the defendants' case in chief, his testimony confirmed Dr. Null's, plaintiffs' expert's, interpretation of the order sheet when he testified that he was certain that the order to give volume was not cancelled until after the phone conversation with Nurse Asher.
>
> Accordingly, the Court can only conclude that the evidence clearly indicates that the order to give volume existed at the time of the phone conversation with Nurse Asher, and, according to plaintiffs' own expert, there simply can be no deviation from the standard of care by Nurse Asher. There's simply, in the Court's estimation, no credible evidence which exists from which a reasonable jury could conclude that a deviation by Nurse Asher from the standard of care was defined by Dr. Null, plaintiffs' expert.
>
> So the motion is going to be granted in part as to volume, denied as to bicarb.

Tr. Vol. VI, pp. 286-88.

Contrary to Appellants' argument, the circuit court did not inform the jury immediately before closing arguments that it had dismissed part of the claim against the Board of Governors. The circuit court simply stated as follows:

> You are instructed that the Court has ruled that Melissa Asher had no duty to advice [sic] Dr. Burech to give volume to Shawn Murphy, therefore, you are not to consider whether or not Melissa Asher advised Dr. Burech to give volume in determining if she deviated from the standard of care.

Tr. Vol. VII, p. 7.

Also contrary to Appellants' argument, the circuit court's ruling is not premised on an assumption that Nurse Asher knew about Dr. Burech's volume order. Dr. Null testified and the circuit court held simply that if the order for volume existed at the time of their telephone conversation, then Nurse Asher was relieved of any duty under the standard of care. The circuit court correctly found that the evidence clearly indicated that the order for volume existed at the

time of Dr. Burech's telephone conversation with Nurse Asher. Appellants have offered no evidence to dispute this fact.[11]

Appellants fail to recognize that Nurse Asher repeatedly testified that she actually went above and beyond Dr. Null's own standard of care opinion. Nurse Asher testified that she did, in fact, mention the option of volume to Dr. Burech. Dr. Burech cannot remember the telephone call but was "certain" the order for volume was on his Orders and in effect at the time of telephone call by and between himself and Nurse Asher. Whether the genesis of the Order for volume was Nurse Asher's recommendation or Dr. Burech's own original thought is of no consequence, especially according to Dr. Null. As a matter of fact, Dr. Null testified that Nurse Asher had no obligation to even tell Dr. Null "anything" or even mention volume. She simply did not have that obligation, despite the arguments of Appellants.

VII. CONCLUSION

For all of the foregoing reasons, this Court should affirm the judgment of the Circuit Court of Ohio for the West Virginia University Board of Governors in all respects.

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[11]Appellants' argument relating to Dr. Null's statement that it was more likely than not that the volume order existed at the time of the telephone conversation is simply a red herring. Obviously, Dr. Null did not render an opinion on the facts – nor could he – by any standard. Instead, Dr. Null simply answered an hypothetical question regarding the standard of care, assuming a particular fact. The circuit court then properly reviewed the record and determined that the evidence clearly indicates the existence of that fact, i.e., that the order for volume was in place at the time of the telephone conversation.

Dated this 4th day of June, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of June, 2008, I caused to be served the foregoing "Brief of Appellee" upon the following counsel of record by depositing true copies thereof in the United States mail, postage prepaid, in envelopes addressed as follows:

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